IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2006 Session

STATE OF TENNESSEE v. CHARLES OWENS

Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2592 J. Randall Wyatt, Jr., Judge

No. M2005-02571-CCA-R3-CD - Filed April 12, 2007

Defendant, Charles Owens, was indicted on five counts of aggravated sexual battery and one count of rape of a child involving victim Y.B., and one count of attempted rape of a child and three counts of aggravated sexual battery involving victim J.S. Both victims are minors and will be referred to by their initials. The State entered a nolle prosequi as to count seven of the indictment charging Defendant with the rape of J.S., and the remaining counts were renumbered accordingly. Following a jury trial, Defendant was found guilty of six counts of the aggravated sexual battery of Y.B., and not guilty of the charges involving J.S. After a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to eight years for each aggravated sexual battery conviction. The trial court ordered Defendant to serve his sentences for his convictions in counts two and three consecutively with each other and to his conviction in count one, and his sentences for his convictions in counts four, five, and six concurrently with his sentence in count one, for an effective sentence of twenty-four years. Defendant does not challenge the sufficiency of the convicting evidence, or the manner or length of service of his sentences. On appeal, Defendant argues that the incidents of prosecutorial misconduct which occurred during opening and closing argument, and during the State's direct and cross-examination of the witnesses at trial, were so pervasive that Defendant was denied his right to a fair trial. After a thorough review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

C. Edward Fowlkes, Nashville, Tennessee; and John Edward Herbison, Nashvillle, Tennessee, for the appellant, Charles Owens.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

Although Defendant does not challenge the sufficiency of the convicting evidence on appeal, we will briefly review the evidence supporting his convictions. Y.B., who was fourteen years old at the time of trial, and J.S., who was seven years old, are half-sisters who share the same mother, Nicole Griffin. Defendant was Ms. Griffin's live-in boyfriend at the time of the incidents.

Ms. Griffin testified that she and Defendant were in a relationship from approximately 1997 until 2002, although there were periods of time during which she and Defendant did not see each other. The family group consisted of Ms. Griffin, Defendant, Ms. Griffin's and Defendant's daughter, Janeen, the two victims, and Ms. Griffin's two sons. During their relationship, Ms. Griffin said that the family lived in a number of residences in Nashville located on Fourth Avenue North, Litton Avenue, Pennington Avenue, Knowles Avenue, and Sharpe Avenue. In addition to Defendant, Ms. Griffin, and the five children, the family also included periodically Defendant's son, Shaun Owens, Shaun Owens' wife and child, Defendant's sister, Janice Owens, and Ms. Owens' son. Defendant maintained a separate residence when Ms. Griffin and her children lived in an apartment on Fourth Avenue North, but Ms. Griffin said that Defendant cared for the children during the day because Ms. Griffin worked at night.

At trial Y.B. identified the incidents of inappropriate conduct supporting the charges by the street address of the residence in which the events occurred. The inappropriate conduct in the family's various residences included Defendant rubbing Y.B.'s chest and genitalia, rubbing his penis against Y.B.'s genitalia while Y.B. lay on her back, naked, in Defendant's bed, and making Y.B. apply lotion to Defendant's pubic area. Y.B. said that Defendant wore a robe, with or without underwear, during many of the incidents. Y.B. said that Defendant showed her photographs of nude women during the acts, and sometimes placed a gun on the bed next to her. Y.B. said the pornographic photographs were kept in a black and gray box which Defendant kept in a closet. Y.B. said that no one but her and Defendant knew about the contents of the box. Y.B. also described a black and white key chain which Defendant kept in the black and gray box. Y.B. said that when she looked inside the key chain, she saw a photograph of a man and a nude woman.

Y.B. said that she was present when Defendant rubbed J.S.'s genitalia with his hand in the bathroom of the Fourth Avenue North apartment on three different occasions. Y.B. said that Defendant came into the bathroom where she was bathing her younger sisters, J.S. and Janeen. Y.B. said that Defendant washed J.S.'s private parts with his hand instead of a washcloth. J.S. was between two and three years old at the time. Y.B. also testified that Defendant rubbed J.S.'s genitalia with his hand while he was dressing her.

Y.B. told her brothers, Nicholas Griffin and Steven Glenn, about Defendant's inappropriate conduct, but she asked them not to tell Ms. Griffin. Y.B. arranged for her brothers to knock on the door if she was ever alone in a room with Defendant. Both young men testified that they knocked

on Defendant's bedroom door on at least one occasion when Y.B. was inside the bedroom with Defendant.

J.S. testified that she had no independent recollection of the incidents which Y.B. testified occurred in the bathroom of the apartment on Fourth Avenue North. J.S. remembered talking with a woman named "Pam" about Defendant's conduct, but could not remember the substance of the interviews.

Y.B. told Ms. Griffin about Defendant's conduct after Defendant and Ms. Griffin had broken off their relationship, and Defendant had moved out of the residence. Ms. Griffin told William Bowen, Y.B.'s father, and Thurman Stevens, J.S.'s father, about the incidents. Mr. Bowen and Mr. Stevens took their daughters to the police station to file a complaint against Defendant.

Jimmie Stevens, J.S.'s grandmother, testified that she and J.S. were watching a television show that contained a child sexual abuse plot line. Ms. Stevens said that J.S. told her "out of the blue" while they were watching the program that Defendant sometimes touched her and Y.B. Ms. Stevens believed that J.S. had misunderstood the subject of the television show and told J.S. to talk to her mother. Both Ms. Stevens and Thurman Stevens testified that J.S. grew upset when it was time to return to Ms. Griffin's home, becoming almost physically sick.

James Edward Scales, with the Metro Police Department's criminal warrant division, testified that he interviewed the victims separately on August 31, 2002. Officer Scales said that both victims were very emotional during their interview, and Officer Scales eventually had to stop questioning J.S. Officer Scales said that Y.B. described incidents involving Defendant touching her on the vagina and buttocks, and Y.B. acknowledged that she had seen Defendant's penis. Y.B. said that she was seven years old when Defendant's inappropriate conduct began, and she was twelve years old at the time of the interview.

Phyllis Lynn Thompson, a clinical social worker with Our Kids Center, Inc., interviewed Y.B. on September 11, 2003. Y.B. indicated that Defendant had touched her on her vagina, chest and buttocks with his penis and his hands. Y.B. said that after Defendant rubbed his penis against her private parts, she found it painful to urinate. Y.B. said that she had rubbed lotion on Defendant's private parts on more than one occasion. Carolyn Smeltzer, a family and pediatric nurse practitioner with Our Kids Center, Inc., performed a physical examination of Y.B. Ms. Smeltzer said that Y.B.'s genital examination was normal which was consistent with the type of reported sexual contact.

Detective Brett Gibson, with the Metro Police Department, recovered the rifle described by Y.B. from Ms. Griffin, and a toolbox from Defendant matching Y.B.'s description of a "black and gray" box. The toolbox contained the key chain, but no other photographs. Detective Gibson arranged for Ms. Griffin to call Defendant and ask him about the charges. During the telephone call, Defendant said that if he inappropriately touched Y.B. or J.S., it was not intentionally. Defendant told Ms. Griffin that if something had happened, Y.B. should have said something when the family lived on Knowles Avenue.

Janice Owens, Defendant's sister, testified for the defense. Ms. Owens stated that she lived with Defendant and Ms. Griffin on Sharpe Avenue for about a year. Ms. Owens said that she did not work and rarely left the apartment. Ms. Owens said that she never saw Defendant engage in any inappropriate behavior with Y.B. and J.S., and that such behavior would have been impossible to conceal because there were so many people in the household.

Defendant testified on his own behalf. He described the various residences in which he and Ms. Griffin had lived and said that there were so many people in the household that "nobody was ever left alone." Defendant said that during this period of time he worked the third shift. Ms. Owens watched the children during the day while he slept, and Defendant watched the children after they arrived home from school. Defendant acknowledged that he bathed the younger children in the evening, then dressed them and "sen[t] them on their way." Defendant said that Y.B. was jealous because he spent more time with Ms. Griffin's sons than with Y.B. Defendant said that he cooperated with the police, and he saw Ms. Griffin and her children, including Y.B. and J.S, "all the time" while the investigation was on-going. Defendant acknowledged that he kept some nude photographs of Ms. Griffin in a toolbox, but he said that he burned the photographs after he and Ms. Griffin ended their relationship.

On cross-examination, Defendant said that Y.B. learned about sexual acts from the x-rated movies which Ms. Griffin periodically rented. Defendant said that Y.B. told J.S. what to say in the younger girl's allegations.

II. Plain Error Analysis

Defendant concedes that trial counsel did not object to any of the prosecutor's conduct which Defendant challenges on appeal but asks this Court to review his claims under a plain error analysis. Defendant contends that the incidents of prosecutorial misconduct, when viewed as a whole, were so pervasive that he was denied his constitutional right to a fair trial.

A. Standard of Review

There is no obligation or duty to grant "relief to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of error." Tenn. R. App. P. 36(a). In the absence of plain error, the failure to make a contemporaneous objection or motion for mistrial constitutes a waiver of the issue. *State v. Robinson,* 971 S.W.2d 30, 42-43 (Tenn. Crim. App.1997).

To recognize the existence of plain error, this court must find each of the following five factors applicable: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'" *State v. Smith*, 24 S.W.3d 274,

282 (Tenn.2000) (adopting the factors first articulated in *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App.1994)); *see also* Tenn. R. Crim. P. 52(b).

"[A]ll five factors must be established by the record before [the reviewing] court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Smith*, 24 S.W.3d at 283. For a "substantial right" of the accused to have been affected, the error must have prejudiced the defendant. In other words, it must have affected the outcome of the trial court proceedings. *United States v. Olano*, 507 U.S. 725, 732-37 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993) (analyzing the substantially similar Federal Rule of Criminal Procedure 52(b)); *Adkisson,* 899 S.W.2d at 642. This is the same type of inquiry as the harmless error analysis under Tennessee Rule of Appellate Procedure 36(b), but the appellant bears the burden of persuasion with respect to plain error claims. *Olano*, 507 U.S. at 732-37, 113 S. Ct. at 1777.

This Court has, in its discretion, from time to time reviewed allegations of prosecutorial misconduct as "plain error" even in the absence of a contemporaneous objection. *See, e.g., State v. Marshall*, 870 S.W.2d 532, 540 (Tenn. Crim. App.1993), *overruled on other grounds by State v. Carter*, 988 S.W.2d 145 (Tenn.1999) (determining in absence of objection that prosecutor's jury argument was not plain error); *State v. Butler*, 795 S.W.2d 680 (Tenn. Crim. App.1990) (considering whether statements of prosecutor were plain error despite lack of objection by the defendant); *Anglin v. State*, 553 S.W.2d 616 (Tenn. Crim. App.1977) (determining that in order to justify reversal on the basis of improper argument and remarks of counsel in absence of objection, it must affirmatively appear that the improper conduct affected the verdict to the prejudice of the defendant).

B. Hearing on Defendant's Amended Motion for New Trial

Following the trial, Defendant obtained new substituted counsel who filed an amended motion for new trial alleging numerous incidents of prosecutorial misconduct which Defendant contended violated his constitutional right to a fair trial. At the motion hearing, trial counsel testified that as part of his general trial practice, he usually did not object to the prosecutor's statements during opening and closing argument. Trial counsel denied, however, that his failure to object in the case *sub judice* was a tactical decision.

Trial counsel said that he could not remember whether he learned before or after opening argument that the incident of sexual abuse against J.S. referenced by the prosecutor in his opening statement occurred in Rutherford County rather than Davidson County. Trial counsel stated that if he had been aware of the venue problem with this charged offense he "would have done something probably differently." Trial counsel recollected that Ms. Stevens testified that J.S. told her that Defendant sometimes touched her and Y.B. He stated that his failure to object to this testimony was not part of his trial strategy. As to the remaining issues raised in Defendant's amended motion for new trial, trial counsel testified that his failure to object to each piece of challenged evidence was not a part of his trial strategy or the result of a tactical decision.

On cross-examination, trial counsel stated that he had conducted between twenty and forty jury trials. He defined a "tactical strategy" as a "conscious decision not to object," or "a plan or some sort of methodology to not object at that point." Defense counsel stated that he had reviewed the issues raised in Defendant's amended motion for new trial. He acknowledged that he did not discern a basis for objecting at the time to the introduction of certain statements or evidence, but trial counsel reiterated that his decision not to object was not a product of trial strategy. He acknowledged that the charges involving J.S. were primarily based on the information supplied by Y.B. prior to trial, and that Y.B. had not defined the acts by the county in which they occurred. Trial counsel acknowledged that he was advised before the commencement of trial that the State had determined from Y.B.'s pre-trial interview that the charge reflected in count seven occurred in Rutherford County, and that the State dismissed this charge. Defense counsel acknowledged that no evidence was introduced at trial involving this incident. He conceded, however, that the information received during discovery revealed that the incident of sexual misconduct attributed to the Rutherford County residence had occurred multiple times. Defense counsel stated that he did not see a basis for objecting to the prosecutor's statement during opening argument that "children have an absolute right to be believed."

III. Opening and Closing Argument

The Tennessee Supreme Court has long recognized that "'argument of counsel is a valuable privilege that should not be unduly restricted.'" *State v. Thomas*, 158 S.W.3d 361, 412 (Tenn. 2005) (quoting *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975)). "Nonetheless, such arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App.2003).

The prosecutor plays a unique and significant role in our criminal justice system. As aptly stated:

> [The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed he should do so. But, while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *see also Judge v. State*, 539 S.W.2d 340, 344-45 (Tenn. Crim. App.1976).

Accordingly, during argument, the prosecutor is not permitted to engage in argument designed to inflame the jurors and must restrict his or her comments to matters properly admitted into evidence at trial. *See State v. Hall*, 976 S.W.2d 121, 158 (Tenn. 1998). Nor is the prosecutor permitted to express his or her "personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *Goltz*, 111 S.W.3d at 6 (citations omitted).

Trial counsel testified at Defendant's motion hearing that it was his usual trial practice not to object to a prosecutor's comments during opening and closing argument. Although counsel avoided classifying this practice as "trial strategy," it has long been recognized that "[t]he question of whether to object to improper argument is a tactical decision for counsel." *State v. Compton*, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982). As the *Compton* court observed, "[i]t is often good tactics for a defendant to permit inflammatory argument by the State without objection; on occasions, it happens that this creates sympathy on the part of the jury for the defendant and animosity toward the State." *Id.*; *see also Davidson v. State*, No. M2005-02270-CCA-R3-PC, 2006 WL 3497997, *7 (Tenn. Crim. App., at Nashville, December 4, 2006), *perm. to appeal filed* (Tenn. Jan. 1, 2007) (noting that counsel may avoid interjecting an objection to improper argument as a tactical decision to avoid unduly emphasizing the prosecutor's comments). Even assuming *arguendo*, that trial counsel's decision not to object to any of the prosecutor's comments during opening and closing argument was not a tactical strategy or decision, Defendant has failed to show that any misconduct on the part of the prosecutor rises to the level of "plain error."

A. "Children Have an Absolute Right to be Believed"

The prosecutor began his opening statement with, "May it please the Court, counsel, ladies and gentlemen of the jury, children have an absolute right to be believed. But don't take my word [for] it." The prosecutor also used the phrase, "children have an absolute right to be believed" at the end of his opening statement, and again told the jury, "But I don't want you to take my word for it. I want you to take their word for it."

Defendant argues that this phraseology impermissibly injected the prosecutor's personal opinion as to the credibility of a witness into argument. *See State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999). The State concedes that the prosecutor's generalization about the credibility of a child witness was improper, but argues that Defendant failed to show that the comments affected the outcome of the trial.

Even assuming *arguendo* that trial counsel's decision not to object to the challenged statements did not rise to the level of a "tactical decision," the trial court instructed the jury to disregard any statements, arguments or remarks of counsel which they believed were not supported by the evidence. The trial court further instructed,

> [a]s with other witnesses, you are the sole judge of the credibility of children who testify. You may consider not only their age, but, their demeanor on the stand, their capacity to observe facts and to recollect them, their ability to understand questions

> put to them and to answer them intelligently, whether they impress you as having an accurate memory and recollection, whether they impress you as a truth-telling individual, and any other facts and circumstances which impress you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining their credibility. On the basis of your consideration you may give the child's testimony such weight as you in your judgment think it is entitled to.

It is well-settled law that the jury is presumed to have followed these instructions. *State v. Lawson*, 695 S.W.2d 202, 204 (Tenn. Crim. App.1985). Moreover, despite Y.B.'s testimony at trial concerning the incidents of sexual abuse she had witnessed against J.S., the jury chose not to convict Defendant on the three charges in which J.S. was the victim. By its verdict, the jury clearly was not persuaded to believe the minor victims at all cost. Based on our review, we conclude that Defendant has failed to show that the prosecutor's comments affected the outcome of the trial to Defendant's detriment. Accordingly, although it was improper for the prosecutor to use the statement, "children have an absolute right to be believed," as a theme during argument, such improper comments do not rise to the level "plain error" thereby precluding relief.

B. Anticipated Testimony

Defendant challenges the prosecutor's following summation of the evidence to be submitted at trial. The prosecutor stated:

> [J.S.] will also come into this courtroom. And she will, again, being seven years of age, coming onto her eighth birthday, testify to the best of her recollection about events that she recalls. And she will testify about her recollection of an incident in which the defendant and she were on the couch, in a living room in a residence with her panties removed, the defendant's pants down, facing away, as the defendant sat on the couch, and the defendant rubbing his penis against her privates. J.S. will testify about that particular incident.

Defendant argues that the prosecutor "had no good faith basis to believe that J.S. would give such testimony before the jury." Prior to J.S. testifying at trial and after the testimony of Detective Gipson, the prosecutor informed the trial court outside the presence of the jury that, because of her age, J.S.'s clearest recollection of Defendant's inappropriate conduct involved an incident which occurred in Murfreesboro, the family's last residence. The prosecutor stated that J.S. would testify that this same behavior occurred at a prior residence which, although J.S. could not remember a specific street address, had to have occurred in Davidson County, the only other county in which J.S. had lived with Defendant. This incident formed the basis of the charge in count nine of the indictment. The prosecutor sought to introduce J.S.'s description of the Murfreesboro incident pursuant to Rule 404(b) of the Tennessee Rules of Evidence.

During a Rule 404(b) hearing, J.S. testified that while Defendant sat in the living room on the couch with his pants pulled down to his knees, she sat on Defendant's lap, facing away from him,

with her bare buttocks touching Defendant's penis. Defendant told J.S. to move her buttocks around on his penis. The following colloquy occurred:

[THE STATE]: The apartment where this happened in the living room, was that in Nashville or in some other city.

[J.S.]: It happened in some other city.

[THE STATE]: And what was the name of the other city? Do you know?

[J.S.]: Murfreesboro.

[THE STATE]: All right. And was this the first time that that kind of touching happened between you and Defendant?

[J.S.]: No.

[THE STATE]: Did it happen in another city or in another house besides the house that was in Murfreesboro?

. . .

[J.S.]: Yes.

[THE STATE]: Do you remember where that house was located?

[J.S.]: No.

J.S. acknowledged that an incident similar to the one she described "happened at least one more time," but she was unable to remember specifically in which residence or city the incident occurred.

At the conclusion of the Rule 404(b) hearing, the trial court found that the prejudicial effect of J.S.'s testimony concerning the uncharged offense in Murfreesboro substantially outweighed its probative value and found the testimony inadmissible.

Based on our review, we conclude that the prosecutor's explanation of J.S.'s anticipated testimony during his opening statement was not offered in "bad faith." The prosecutor apparently continued to hope up until the time that J.S. testified, that J.S. would be able to testify about the incident of sexual misconduct occurring on a couch in a residence in Davidson County. J.S. was ultimately unable to do so, and the prosecutor on the second day of trial elected to rely on an inappropriate touching in the bathroom of the Litton Avenue residence in Davidson County to support count nine of the indictment. Nonetheless, we find no error in the explanation of J.S.'s

anticipated testimony during the prosecutor's opening statement. Moreover, even assuming *arguendo* that any error occurred, Defendant has failed to show that the outcome of the trial was adversely affected because the jury acquitted Defendant of the charges against him which involved J.S. as the victim. Thus, no plain error is present, and Defendant is not entitled to relief on this issue.

C. Comments on the Witness's Demeanor

The prosecutor stated during closing argument, "Before [Y.B.] uttered word one in this courtroom, you had a chance to see her walking through these doors. Was that a lie?" The prosecutor again referred to Y.B.'s demeanor on the witness stand, stating, "And, all the time when she would look over at him and gaze, all the manners in which her body posture while she was talking about these things, all the other physical attributes that you witnessed, walking into the courtroom, that other people witnessed, there was only one man named as perpetrator, [Defendant], nobody else."

Defendant argues that these comments were impermissible because they were not based on facts in evidence and violated his right of confrontation. The credibility of a witness is left to the determination of the jury, and it is well settled that a witness's demeanor is an important factor in the jury's assessment of witness credibility. *See Bolin v. State*, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966). While a witness's demeanor is not usually reflected in the written transcript of the proceeding, jurors were free to observe Y.B.'s demeanor and draw their own conclusions as part of their credibility determination.

The trial court instructed the jury that the jury was:

> the sole judge of the credibility of any children who testify. You may consider not only their age, but, their demeanor on the stand, their capacity to observe facts and to recollect them, their ability to understand questions put to them and to answer them intelligently, whether they impress you as having an accurate memory and recollection, whether they impress you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining their credibility.

The prosecutor's comments on Y.B.'s demeanor at trial do not present a confrontation clause problem. The Confrontation Clause protects the right of a defendant to confront the witnesses who testify against him or her. Y.B.'s demeanor in the case *sub judice* does not represent testimonial evidence which would trigger confrontation clause concerns. *See State v. Maclin*, 183 S.W.3d 335, 343 (2006) (noting that the confrontation clause extends to a defendant the right to confront the witnesses against him).

We conclude that the prosecutor's comments on Y.B.'s demeanor during closing argument do not constitute prosecutorial misconduct, and thus no plain error exists. Defendant is not entitled to relief on this issue.

Defendant also argues that the prosecutor's comment in closing argument that the jury should either believe the victims' testimony or Defendant's testimony presented an overly simplified explanation of the jury's role. Defendant relies on *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978)(concluding that it was error for the prosecution to tell the jurors that they had to choose between the two stories) in support of his theory. Clearly, however, in light of the jury's verdict acquitting Defendant of the charges against him involving J.S., the jury was not compelled to believe the victims' testimony at all cost. Thus, Defendant has failed to show that any impropriety in the gist of the prosecutor's argument on this issue adversely affected the verdict. Because we find no plain error, Defendant is not entitled to relief on this issue.

D. Coaching of Witnesses

The prosecutor commented during closing argument that in cases involving on-going sexual abuse, it is "extremely difficult for children to be able to provide the kinds of descriptive details that often times" the jury would like in exercising their role. As part of this line of argument, the prosecutor observed that "we prepare children for court, that is what we are about, . . . but we can't coach demeanor." This set of comments was in response to Defendant's trial testimony that the victims had been coached as to how to phrase their allegations. We do not find the comments improper when viewed in context. Defendant is not entitled to relief on this issue.

E. Argument Based on Facts Not in the Record

Defendant argues that the prosecutor improperly commented on facts not in evidence when he stated, "Sure, you heard from Carolyn Smeltzer that her medical examination was negative, there were no findings, which is true in ninety-percent of our cases, no medical findings." Ms. Smeltzer testified during cross-examination that physical evidence specific to sexual abuse is found in less than ten percent of children registering such complaints. Although phrased in the converse, the prosecutor's statement was a permissible comment on the evidence in the record. The use of the pronoun "our," when viewed in the context of the prosecutor's argument, did not convert this comment to an improper personal opinion as argued by Defendant. Defendant is not entitled to relief on this issue.

Ms. Griffin testified that she took Y.B., who was eleven years old at the time, to a doctor for a gynecological examination following the onset of Y.B.'s menstruation. Ms. Griffin said that when the doctor told Y.B. that she was going to run a series of tests, including a pregnancy test, Y.B. became hysterical. Ms. Griffin said that after she explained to Y.B. that she could not get pregnant "just by having a period," Y.B. calmed down. The prosecutor referred during closing argument to this evidence as follows:

> Many of [you] might have thought, well, what was the reason that was brought out? Ladies and gentlemen, let me suggest this scenario to you of why that evidence is so important. . . Why? Because an eleven-year-old girl who is not sexually sophisticated and doesn't know, thinks that what's been going on between her and the defendant

might result in pregnancy. And, only when her mother assures her of what needs to happen in order for that to take place, is she [al]layed in her fears."

Viewed in context, we conclude that this comment was a reasonable inference based on the evidence presented at trial. Defendant is not entitled to relief on this issue.

Defendant contends that the prosecutor's comment during closing argument that J.S. had "made disclosures to investigators" before is not supported by the record. During their direct examination, both Ms. Thompson and Ms. Scales focused their testimony on their respective interviews with Y.B, and not J.S. Officer Scales testified that he interviewed J.S. alone in connection with the charges against Defendant, but stated that when he attempted to question J.S. about the charges, J.S. became very emotional, and he terminated the interview. J.S., however, acknowledged during her direct examination that a woman named "Pam" had interviewed her about the charged offenses. Although it is not clear how detailed J.S.'s interviews were, we conclude that the challenged comment was not improper. Thus, Defendant is not entitled to relief on this issue.

F. Biblical Reference

During closing argument, the prosecutor stated:

> That little girl, [J.S.], when she took the witness stand and told that she couldn't remember things that happened, even though she talked to other people before, even though before she had made disclosures to investigators before, when that little girl got on the witness stand and came off the witness stand, there was one thing that was irrefutable and you know this in your hearts. There wasn't a malicious bone in that little girl's body. That is the essence of innocence. And, for anyone to come in here and to say that [J.S.] was corrupted to make these allegations; that she was making all of the false accusations against him, is nothing short of blasphem[y].

Defendant argues that the word "blasphemy" has impermissible "religious overtones." References to the Bible during closing argument are inappropriate. *State v. Reid*, 164 S.W.3d 286, 347 (Tenn. 2005)(citing *State v. Cribbs*, 67 S.W.2d 773, 783 (Tenn. 1998)). Nonetheless, in view of Defendant's acquittal of the charges involving J.S., Defendant has failed to show that the prosecutor's use of the word, "blasphemy," affected the verdict to Defendant's detriment. Finding no plain error, we conclude that Defendant is not entitled to relief on this issue.

G. Improper Shifting of the Burden of Proof

Defendant argues that the prosecutor's explanation of "reasonable doubt" during closing argument impermissibly shifted the burden of proof to Defendant by effectively suggesting to the jury that they should not use "reasonable doubt" to "avoid doing their duty."

During his closing argument, defense counsel cautioned the jury that "the little differences" in the witnesses' testimony are important "because all of these things add up, whether it be good or bad." Later, defense counsel argued that "there are obviously other alternatives to what happened here or things that could have happened. And, there were plenty of opportunities for bad things to happen to these young girls, plenty of opportunities."

In response to Defendant's argument, the prosecutor stated:

> [a]nd so, when counsel tell you that it's important to focus on the details, that the differences in the details are important, he does what any good defense attorney does in a crime of this nature. And, that is, to go for what they consider to be the principal defense of establishing reasonable doubt. And, reasonable doubt in the law is a doubt that is based on reason. It is something for which you can give a reason. It is something that is based on common sense interpretation and analysis of the evidence. It is something for which there is support. It is not something based on speculation. It is not based on a duty, or a search, to avoid doing your duty. It is not about a search for doubt.

We do not place the same interpretation on the prosecutor's comments as does Defendant when the comments are viewed in context rather than isolation. Moreover, the trial court properly defined the concept of reasonable doubt and instructed the jury that the burden of proving Defendant guilty beyond a reasonable doubt "remains on the State throughout the trial of the case." By its verdict, the jury clearly was able to follow the trial court's instruction and "did not avoid its duty" in determining the guilt or innocence of Defendant. Defendant has failed to show that any ambiguity in the prosecutor's remarks about the definition of "reasonable doubt" adversely affected the verdict. Because no plain error is present, Defendant is not entitled to relief on this issue.

Defendant challenges the prosecutor's observation that Defendant came "up here with half of his version on the witness stand," and that the reason "we are in this courtroom" is "because [Defendant] wants to convince you that he is a good man and would not do these things." Defendant contends that such comments impermissibly shifted the burden of proof to him. Arguably, these comments were in response to Defendant's testimony that he was open and cooperative with the investigating officers, and that he fulfilled the role as principal caregiver for the children in the household. Rather than an impermissible attempt to shift the burden of proof, we view these statements as coming perilously close to an improper injection of the prosecutor's personal opinion as to Defendant's credibility.

Defendant, however, made his credibility a key issue by taking the stand to deny that he participated in the crimes, and by suggesting that the victims were lying when they testified that Defendant committed the alleged offenses. In *State v. Beasley*, 536 S.W.2d 328, our supreme court held that closing argument should be supported by the evidence and the reasonable inferences to be drawn from it, and that a prosecutor's personal opinion as to the credibility of witnesses should not be interjected into argument. *Id*. at 330; *see also Goltz*, 111 S.W.3d at 6 (noting that it is

unprofessional conduct for the prosecutor to express his personal belief as to the truth or falsity of any testimony or evidence or the guilt of the defendant). The statement that Defendant wanted to tell the jury that he was a good man is supported by Defendant's testimony. The prosecutor's comment that Defendant told "half of his version" during direct examination has borderline support in that if the victims' testimony was believed, then it can reasonably be inferred that Defendant was less than truthful. Viewing these comments in context, however, we conclude that any error did not affect the outcome of the proceeding, and thus do not constitute plain error. Defendant is not entitled to relief on this issue.

H. Improper Generalizations

Certain aspects of the prosecutor's argument were improper, however. The prosecutor made several inappropriate general references to his case load involving child sex abuse victims and the emotional impact of prosecuting such cases. Representative of such comments, the prosecutor observed at one point, "The job that I do is an ugly job. There is nothing pretty about the work that we do with abused children. Everyday I wonder whether there is a new wrinkle, a new fad, a new way of committing these crimes. And, I am always unpleasantly surprised by something different that happens." We do not interpret the prosecutor's generalizations as specifically referring to Defendant's case as does Defendant, but these comments, and others of the same genre, were irrelevant and risked diverting the jury from its duty to decide the case based on the evidence presented. *Goltz*, 111 S.W.3d at 6. Although improper, however, Defendant has failed to show that the prosecutor's generalizations about prosecuting sexual abuse cases adversely affected the verdict. Defendant is not entitled to relief on this issue.

More troubling is the prosecutor's response to defense counsel's argument that Defendant cooperated with the investigating officer. The prosecutor argued, "[p]eople who commit this type of crime are a different breed. They think they can explain, they can justify, they can give explanations, and talk their way out of these things." A panel of this Court recently found that a prosecutor's characterization of a sex offender as a "different breed" of criminal constituted prosecutorial misconduct. *State v. Charles L. Williams*, No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at *22-23 (Tenn. Crim. App., at Nashville, Nov. 29, 2006), *no perm. to appeal filed*. The *Williams* court found that

> [t]he prosecutor's statements during closing argument were far from "temperate;" rather, they seemed to be crafted specifically to inflame the jury into concluding that those accused of sex crimes are more likely than those accused of other crimes to lie and say they are innocent when they are in truth guilty. Furthermore, the prosecutor's "expert" opinion on the propensity of sex crime defendants to deny their crimes was not based upon evidence properly introduced at trial. Accordingly, we conclude that the prosecutor's statements were improper, and therefore the key issue before this Court is whether this conduct prejudiced the Defendant.

Charles L. Williams, 2006 WL 3431920, at *22.

In *Charles L. Williams*, unlike the instant case, the defendant made a contemporaneous objection to this portion of the prosecutor's closing argument, and his issue on appeal was thus reviewed under a harmless error analysis. In so doing, the *Williams* court observed, "simply finding an argument improper does not alone merit a new trial. When argument is found to be improper, the established test for determining where there is reversible error is 'whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant's detriment.'" *Charles L. Williams*, at *21 (citations omitted). In the case *sub judice*, we must review Defendant's claims of prosecutorial misconduct under a plain error analysis, wherein Defendant bears the burden of persuasion. *Olano*, 507 U.S. at 732-37, 113 S. Ct. at 1777.

This Court has adopted a five-part test to measure the prejudicial impact of improper prosecutorial misconduct, which requires appellate court's to examine the following factors: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecutor; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *See Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App.1976); *see also Goltz*, 111 S.W.3d at 5-6.

The trial court did not take any curative steps in the absence of a contemporaneous objection by Defendant to the comments. It is hard to discern the prosecutor's intent from the record although it is clear that he at times exhibited an overly zealous approach to his argument. As to the cumulative effect of the error, Defendant has failed to show that any other comments made by the prosecutor during opening and closing argument affected the verdict to Defendant's detriment. Finally, in light of the jury's acquittal of the charged offenses involving J.S. as a victim, we cannot conclude that the prosecutor's improper characterization of sex offenders as a "different breed" was so inflammatory that the jury was encouraged to convict Defendant at all costs.

Based on the foregoing, we conclude that Defendant has failed to show that the prosecutor's comments were so improper or inflammatory as to have prejudicially affected the verdict. Thus, the improper conduct does not rise to the level of plain error, and Defendant is not entitled to relief on this issue.

IV. Direct and Cross-Examination

A. Impermissible Reference to Uncharged Offenses

Defendant argues that the prosecutor ignored the trial court's admonishment to avoid introducing any evidence of sexual misconduct occurring in Rutherford County during Jimmie Stevens' direct examination, and that such conduct constituted prosecutorial misconduct.

Prior to the Rule 404(b) hearing, the State alerted the trial court that it had learned that some of the incidents of inappropriate conduct revealed during Y.S.'s and J.S.'s interviews took place in Rutherford County rather than Davidson County. After listening to the argument of counsel, the trial court deferred ruling on the admissibility of the evidence under Rule 404(b) but stated:

I have to hear this witness [J.S.] and – and see what I'm doing. And if you need to have a jury-out, fine. But I don't want to open the door right off the bat and getting [sic] into something about Murfreesboro when you've got enough confusion already with these children and their efforts to tell the truth here. So let's just limit it to Nashville.

Prior to the trial court conducting a Rule 404(b) hearing, Ms. Stevens testified as follows:

[THE STATE]: How did you first learn of that police complaint that had been made?

[MS. STEVENS]: How did I learn? They called me. [J.S].'s mother, Nicole, called me and told – asked me did [J.S.] tell me that [Defendant] had touched her? And I didn't know anything about it. And I told her yes.

[THE STATE]: When was it or have you had a conversation with [J.S.] to that effect?

[MS. STEVENS]: Well, one day we were watching T.V. And she – a show where some child had been touched. Then she, just out of the blue, she said, that sometimes [Defendant] touches me and my sister.

[THE STATE]: Did you ask her further questions –

[MS. STEVENS]: Yes, I did. I said, how? What do you mean? You know, how did he touch you? And when – she just wouldn't elaborate, you know, because I said, what has he touched, your leg, trying to get, you know, get her to say something, but she never would. She would not elaborate. She said he touched her. And I – I think – well, I think I wanted – I just turned – I don't know what I did. I guess I didn't want to really, see anything. . . .

Ms. Stevens did not indicate during her testimony when this conversation took place other than it was sometime before or during the summer of 2002. Defendant submits that the touching referenced in J.S.'s hearsay statement could have referred to the incident that occurred in Rutherford County. Defendant contends that the prosecutor, "by eliciting the testimony of Jimmie Stevens without having requested a jury-out hearing, engaged in a sneaky, reckless subterfuge designed to avoid, vitiate or subvert the trial court's 404(b) ruling."

The only evidence of a touching involving J.S. which had been placed before the jury thus far in the trial was Y.S.'s testimony that Defendant inappropriately touched J.S. in the bathtub while she was taking a bath in the family's Davidson County residence. Defendant concedes that the record "is at best ambiguous as to whether this alleged spontaneous disclosure" pertained to any incidents that occurred in Rutherford County. Based on our review, we conclude that the record does not clearly establish what occurred at trial thereby precluding plain error analysis. *See Adkisson*, 899 S.W.2d at 641-42. Defendant is not entitled to relief on this issue.

B. *Brady* Violation

Defendant argues that the prosecutor's failure to provide trial counsel prior to trial with the victims' inconsistent statements concerning the venue of one of the charged offenses involving J.S. violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In *Brady v. Maryland*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. 373 U.S. at 87, 83 S. Ct. At 1196-97. In order to establish a due process violation under *Brady*, four prerequisites must be met: 1. the defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not); 2. the State must have suppressed the information; 3. the information must have been favorable to the accused; and 4. the information must have been material. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn.1995). Favorable evidence includes evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Johnson v. State*, 38 S.W.3d 52, 56-57 (Tenn.2001) (quoting *Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978)). Evidence is deemed material if there is a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id*. at 682. The burden of proving a *Brady* violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. *Edgin*, 902 S.W.2d at 389.

We note initially that the record does not clearly establish that Y.B. made an inconsistent statement as such concerning the location of the alleged incidents of sexual abuse. It appears that Y.B. did not specifically identify the location of each of the alleged incidents of sexual abuse during her initial interview with the investigating officers. Later, during her preparation for trial, Y.B. said that the incident described in count seven of the indictment, alleging an act of fellatio between Defendant and J.S., occurred in Rutherford County. The State dismissed count seven of the indictment prior to trial.

At the hearing on Defendant's amended motion for new trial, trial counsel stated that to the best of his recollection, at some point prior to the testimony of the first witness, the State disclosed to the trial court that it had learned that original count seven of the indictment involved an incident which occurred in Rutherford County. Trial counsel also acknowledged that it was his recollection that Y.B. did not specify a location for original count seven during her initial interview. Trial counsel agreed that he would not have changed his trial strategy if he had learned of the venue issue relevant to original count seven a few days, or even a month, earlier. Trial counsel acknowledged that he received copies of the interviews of the State's witnesses, and that the victims' interviews by Our Kids, Inc., were made available to him prior to trial. The remaining counts, as reflected in the State's election of offenses, occurred in Davidson County. On the second day of trial, the State made an election of offenses reflecting that count nine was based on an alleged incident involving J.S. which occurred in the family's bathroom at a Davidson County residence. As previously noted, the jury ultimately acquitted Defendant of the charges involving J.S. as the victim.

Based on our review of the record, we conclude that Defendant has failed to show that the State withheld information that rose to the level of materiality necessary to support a *Brady* claim. In view of the fact that count seven of the indictment was dismissed after the State learned that the venue of the charged offense was outside Davidson County, we conclude there is no possibility that the result of the proceeding would have been different had the State disclosed the venue problem with count seven sooner. Defendant is not entitled to relief on this issue.

C. *Crawford* Issues

During his direct examination, Detective Gipson testified about the information he had learned from his interviews with various members of the victims' family. Defendant argues that the prosecutor "had no good faith basis" to believe that the out-of-court statements made to Detective Gipson by declarants who had not yet testified at trial did not violate the principles set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We note that Defendant has listed numerous challenged statements in one portion of his brief which he challenges without providing appropriate references to the record. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). In a separate section of his brief, Defendant raises a *Crawford* challenge to Officer Scales' and Ms. Thompson's testimony as to statements made to each of them by Y.B. Notwithstanding Defendant's failure to make appropriate references to the record for some of the challenged statements, we find Defendant's reliance on *Crawford* misplaced.

In *Crawford*, the United States Supreme Court concluded that out-of-court statements which are testimonial in nature are not admissible under the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had the opportunity to cross-examine the declarant. *Id*. at 53-54. Although the court observed that statements made to a police officer during an investigation of a crime are "testimonial even under a narrow standard," "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id*. at 59 n.9, 124 S. Ct. at 1369.

The majority of the challenged hearsay statements according to Defendant's brief were made by Ms. Griffin and Y.B. during their respective interviews with Detective Gipson, and by Y.B. during her interviews with Ms. Thompson and Officer Scales. The Confrontation Clause presents no barrier to the introduction of these out-of-court statements because the declarants were available and testified at trial. *Id.*

The only challenged statement which does not appear to fall into this category concerned Detective Gipson's testimony that the T.B.I. crime laboratory's examination of Ms. Griffin's comforter did not reveal the presence of any semen or hair, and that the one spot of blood found on the comforter was too small to provide a sample for DNA testing. The State did not offer the laboratory report into evidence or call the preparer of the report as a witness, and no DNA evidence was introduced which linked Defendant to the charged offenses. Defendant has failed to show that this brief reference to DNA testing during Detective Gipson's lengthy direct examination, which was favorable to Defendant, adversely affected the outcome of the proceeding thus precluding plain error review. Defendant is not entitled to relief on this issue.

D. Improper Reference to an "Alibi"

Defendant argues that the prosecutor improperly mischaracterized Ms. Owens' testimony as "alibi" evidence during Ms. Owens' cross-examination.

Ms. Owens testified on direct examination that she lived with Defendant, Ms. Griffin, Ms. Griffin's five children, and Ms. Owens' son at the three-bedroom residence on Sharpe Avenue. Ms. Owens stated that she did not work during that period of time and cared for the children during the day. On cross-examination, Ms. Owens reiterated that she rarely left the Sharpe Avenue residence. The following colloquy ensued:

[THE STATE]: So, in effect, what you're telling us is that for virtually for all the time that your brother and [Ms. Griffin] were living at the Sharpe . . . home, you would be there and would know if anything was going on between . . . your brother and [Y.B.] or any of the other children?

[MS. OWENS]: Most of the time, uh-huh.

. . .

[THE STATE]: I mean, that's why you're here testifying on your brother's behalf, is to suggest that he couldn't possibly commit any acts at Sharpe while you were living there, right?

[MS. OWENS]: It was like impossible, so many people in there.

. . .

[THE STATE]: And, that's why you're here, isn't it —

[MS. OWENS]: Yeah.

[THE STATE]: – to give him an alibi –

[MS. OWENS]: – for those time periods, right?

[MS. OWENS]: Yeah.

Defendant testified that during the time that the offenses were alleged to have occurred, the family "all stayed together," and "nobody [was] every left alone." On cross-examination, Defendant stated that "eight, nine, ten people" were living at the residences on Litton, Knowles and Sharpe. The prosecutor remarked, "Gosh! You had a pretty tight alibi there according to your testimony today." The prosecutor continued to refer to Defendant's assertions that he was never alone with either victim as an "alibi."

This court has previously defined "alibi" as "'[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.'" *State v. Looper*, 118 S.W.3d 386, 416 (Tenn. Crim. App. 2003) (quoting *Black's Law Dictionary* 72 (7th ed.1999)). Defendant argues that the prosecutor's misuse of this "loaded term" was "deliberately false and misleading."

Ms. Owens' testimony supported Defendant's assertion on direct examination that he could not have committed the offenses in the manner described by Y.B. during her testimony because there were too many people in the house. An "alibi" in its informal meaning is an "excuse especially to avoid blame." *Webster's College Dictionary* 35 (1991). It is doubtful that the jury perceived the distinction between the legal and the vernacular definition of "alibi." There is no indication that the prosecutor acted in bad faith in his choice of words to describe Defendant's theory of defense, or that the word "alibi" affected the outcome of the proceedings. Without the presence of plain error, Defendant is not entitled to relief on this issue.

E. Improper Comment during Cross-Examination

Defendant argues that the prosecutor engaged in prosecutorial misconduct when he made the following comment during Ms. Owens' cross-examination concerning her interview with police officers about the charged offenses: "You know, its amazing. Detectives are required to kind of keep that information in their reports. There's no mention of that." This comment was in response to Ms. Owens' assertion on direct examination that she had told the investigating officer that Defendant could not have committed the charged offenses because there were so many people in the household.

The State did not introduce any of the police reports generated during the course of the investigation into evidence, and neither Detective Gipson nor Officer Scales testified specifically that they had interviewed Ms. Owens. It is improper for a prosecutor "to testify not only to facts outside the record but also to matters within his personal knowledge as the chief law enforcement official in the county." *Judge*, 539 S.W.2d at 345. By doing so, the prosecutor becomes in effect a witness for the state, not subject to cross-examination, and places his or her credibility before the jury. *State v. Smith*, 803 S.W.2d 709, 710 (Tenn. Crim. App. 1990); *Judge*, 539 S.W.2d at 345.

Having found the prosecutor's comment improper, we must next decide whether the comment was so prejudicial as to invalidate Defendant's conviction under the guidelines set forth in *Judge v. State*. Although overly zealous perhaps, we cannot say the prosecutor was improperly motivated based on our review of the record in context. Moreover, although no curative instruction was provided because of the absence of an objection, defense counsel during redirect examination thoroughly questioned Ms. Owens as to her role in the investigation of the charged offenses. Thus, viewing the record as a whole, we conclude that this comment, although improper, did not affect the jury's verdict to Defendant's detriment. Defendant is not entitled to relief on this issue.

F. Improper Comments on Defendant's Character

Defendant argues that the prosecutor improperly attempted to place Defendant's character in issue by asking Defendant on cross-examination, "You're here to tell this jury that you are a good person and you wouldn't do these kinds of things right?" Defendant submits that the prosecutor's conduct was in violation of Rule 404(a) of the Tennessee Rules of Evidence.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion." Tenn. R. Evid. 404(a). Certain limited exceptions, however, to the exclusion of such evidence are permitted. "In the context of any criminal case, the accused is entitled to offer evidence of 'good character . . . as tending to show that [the accused] would not commit a crime.'" *State v. Phipps*, 883 S.W.2d 138, 153 (Tenn. Crim. App. 1994) (quoting *McKinney v. State*, 552 S.W.2d 787, 790 (Tenn. Crim. App. 1977)). The evidence may be introduced through the testimony of character witnesses or through the testimony of the accused. *Id*. If the accused places his character in issue, the State may cross-examine the accused to show that the accused's character is not really good. Tenn. R. Evid. 404(a)(1); *Phipps*, 883 S.W.2d at 153; Neil Cohen et al., Tennessee Law of Evidence § 404.3 (3d ed.1995).

During the presentation of Defendant's case-in-chief, defense counsel presented testimony through Ms. Owens and through Defendant testifying personally about Defendant's role as the caregiver of Defendant's daughter, the victims, and Ms. Griffin's other children, and Defendant's good relationship with all of the children. Thus, we conclude that Defendant placed his "good character" in issue to show that he would not have committed the charged crimes. The prosecutor's question was within the scope of proper cross-examination. Defendant is not entitled to relief on this issue.

G. Argumentative Questioning

Relying on *State v. Baker*, 751 S.W.2d 154 (Tenn. Crim. App. 1987), Defendant argues that the prosecutor's repeated questions during his cross-examination as to whether he believed that Y.B., Ms. Griffin and Detective Gipson had lied were argumentative and improper.

During his direct examination, Defendant denied that he had engaged in inappropriate conduct with the victims and provided an explanation for some of the incidents referenced by Y.B. during her direct examination. Defendant also stated that Ms. Griffin's testimony was incorrect in certain regards, and he maintained that Detective Gipson had altered the lock on his tool box. During the State's cross-examination, the following colloquy occurred:

[THE STATE]: You're here to tell this jury that you are a good person and you wouldn't do these kinds of things, right?

[DEFENDANT]: Well, everybody that knows me knows that I'm a good person.

[THE STATE]: And, you're also here to tell this jury that [Ms.] Griffin isn't a very good person, she's not a good mom, aren't you?

[DEFENDANT]: Well, she's a good person, but, she's not a good mom.

[THE STATE]: And, you're also here to tell this jury that [Y.B.] is a liar, right?

[DEFENDANT]: True.

[THE STATE]: Okay. And, what I understood you to tell us a little while ago . . . is that not only is [Y.B.] lying, not only is [Ms.] Griffin lying, but, the police detective, Detective Gipson, he's kind of fabricated evidence against you, too?

[DEFENDANT]: Yes, he did.

Defendant also points to several other instances of what he views as argumentative questions or comments. At one point, the prosecutor stated, "That's an incredible story, [Defendant]."

In *Baker*, this Court examined a similar situation in which the prosecutor, during the defendant's cross-examination, asked, "Is what you are telling the ladies and gentlemen of this jury is all of those police officers that testified against you are lying?" *Id*. at 162. The prosecutor's question was apparently prompted by the contradiction between the arresting officers' testimony and that of defendant about the circumstances surrounding the defendant's arrest. *Id*. We concluded that

although "it [was] evident that the cross-examination, was inept, probably brought about by the zeal of the examiner to make out his case, . . . the remarks of the Assistant District Attorney General did not detract from the fairness of the trial in this case." *Id*.

Based on the facts and circumstances in the case *sub judice*, we conclude that the prosecutor was entitled to clarify on cross-examination whether Defendant maintained that Y.B., Detective Gipson and Ms. Griffin were lying during the presentation of their testimony, or merely mistaken or inaccurate as to the details about which they testified. Accordingly, Defendant has failed to show that a clear and unequivocal rule of law has been breached thereby precluding the finding of plain error. *Adkisson*, 899 S.W.2d at 641-42. Defendant is not entitled to relief on this issue.

H. Improper Eliciting of Hearsay Evidence

Defendant contends that the prosecutor improperly elicited hearsay evidence during the direct examination of the State's witnesses. Defendant acknowledges that no objection to the challenged testimony was made. Defendant contends, however, that even in the absence of a contemporaneous objection, the introduction of hearsay evidence by the State without a good faith belief that the admission of such evidence was supported by an exception to the hearsay rule constitutes prosecutorial misconduct.

In *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000), our supreme court concluded that "[a]s our cases make clear, a failure to object to otherwise inadmissible evidence will allow that evidence to be considered as if it were, in fact, fully admissible under the law of evidence." *Id*. at 280. The court observed that "[a]s early as 1885, this Court has stated that parties 'may admit illegal evidence, if they don't choose to object. If they do not want to admit it, they should object as soon as it is offered, or its illegality appears.'" *Id*. at 279 (quoting *Baxter v. State*, 83 Tenn. (15 Lea) 657, 665 (1885)). The burden of objecting to the admission of otherwise illegal evidence is thus placed upon the party seeking to prevent its admission. "This same principle is reflected today in Rule of Evidence 103(a)(1), which requires that a timely objection be made to preserve an error, and it is also reflected in Tennessee Rule of Appellate Procedure 36(a), which requires that a party take any action reasonably available so as to prevent an error or to mitigate its harm." *Id*. at 280.

In view of *Smith*, we decline to find prosecutorial misconduct based on the State's introduction at trial of otherwise inadmissible hearsay evidence when the defendant does not take the proper actions to prevent the introduction of such evidence by entering a timely objection. Accordingly, we conclude that Defendant has failed to show that the State's eliciting of the challenged evidence resulted in the breach of a clear and unequivocal rule of law thereby precluding plain error review. *Adkisson*, 899 S.W.2d at 641-42. Defendant is not entitled to relief on this issue.

Defendant also argues that the introduction of the hearsay testimony violated his confrontation rights. The challenged statements include out-of-court statements made by Y.B. to her brothers, the investigating police,"Ms. Pam," and Ms. Thompson, and J.S.'s out-of-court statement made to Ms. Stephens. Both Y.B. and J.S. were available at trial and thus subject to cross-

examination. Thus, the Confrontation Clause presents no barrier to the use of Y.B.'s and J.S.'s prior testimonial out-of-court statements. *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369.

I. Scope of Cross-Examination

Defendant argues that the prosecutor's repeated references to Defendant's statement to Detective Gipson exceeded the scope of proper cross-examination because the State did not introduce Defendant's statement into evidence as an exhibit. For example, during Defendant's cross-examination, the following colloquy occurred:

[STATE]: Well, that was one of the things that you suggested to Detective Gipson, was how [Y.B.] would have intimate knowledge of your anatomy.

[DEFENDANT]: She comes in the room all the time.

[STATE]: Oh, all the time.

[DEFENDANT]: All the time.

[STATE]: But, you told Detective Gipson that you didn't know she would come into the room.

[DEFENDANT]: No, I didn't tell him that.

[STATE]: Yes, you did.

[DEFENDANT]: No. I'm afraid not.

[STATE]: You told Detective Gipson that you wouldn't know whether she came in the room or not [be]cause you would be asleep. But, that was the only thing you could think of as to how she would have that information.

[DEFENDANT]: I – I –

[STATE]: Isn't that what you said?

[DEFENDANT]: I wouldn't know if she be in and stuff cause [sic] . . . moved around.

Later, the prosecutor asked, "Except, didn't you tell Detective Gipson initially that the box was kept up on a shelf, and it was kept locked and the kids really didn't have access to it?" Defendant

responded, "Well, I was trying to save [them] . . . not save [them], but, I was trying to not make [them] look bad." At another point, the prosecutor asked Defendant whether he had told Detective Gipson that Y.B. fabricated stories about sexual activities, and Defendant responded, "I don't remember, I may have."

During his direct examination, Defendant testified about his interaction with Detective Gipson and some, but apparently not all, of the information he relayed to Detective Gipson during the course of the investigation. What portion of Defendant's information was subsequently reduced to a written statement is not discernable from the record on appeal. Defendant's statement was not introduced as an exhibit at the hearing on the amended motion for new trial and thus is not included in the record on appeal. A defendant has the burden of ensuring that the record on appeal is "sufficient to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(a); *State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn.1993). Plenary review, much less plain error review, is precluded when the appealing party fails to include that portion of the record upon which the party relies. *Id*. Without the inclusion of Defendant's statement in the record to permit review of his challenges, Defendant has failed to clearly establish what occurred in the trial court. *Adkisson*, 899 S.W.2d at 641-42. Defendant is not entitled to relief on this issue.

V. Cumulative Effect of Errors

Defendant argues that the cumulative effect of the incidents of prosecutorial misconduct deprived him of the right to a fair trial. Having found no errors which rise to the level of plain error, there are no errors to accumulate. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgments of the trial court.

_____

THOMAS T. WOODALL, JUDGE